FOR THE JUNIORS.

IMPLIED WARRANTY OF TITLE ON THE SALE OF A CHATTEL.—We must here note a diversity between the sale of a chattel and the sale of land. If the owner of land sells and conveys to the buyer in fee simple, who accepts a deed without warranty or covenants for title, the law is, supposing the seller is not guilty of fraud, that there is *no implied warranty of title*, and the buyer has no recourse against the seller if the title proves bad, and the buyer is evicted by the true owner. And the same rule was formerly considered to apply to the sale of a chattel—that there was no implied warranty of title. See 2 Schoul. Pers. Prop., sec. 376, citing Noy's maxim to that effect, and reviewing the earlier English cases.

It is now held, however, in England, in *Eichholz v. Banister*, 17 C. B. N. S. 621 (decided in 1864), that the buyer can recover from the seller the price paid when it turns out that the goods were stolen, and they are taken from the buyer by the true owner. And Benjamin on Sales, sec. 639, thus states the present English rule: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it is shown by the facts and circumstances of the sale, that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the chattel sold." This amounts to saying that there is from the fact of sale a *presumption* of title warranty; but this presumption may be rebutted, and it may appear that the seller merely *quit-claimed his interest*, whatever it might prove to be, and the buyer took his chances as to the title, the price being adjusted accordingly.

In the United States it is settled law that, when the goods are *in the seller's possession*, warranty of the title is implied. See *Perley v. Balch*, 23 Pick. (Mass.) 283 (34 Am. Dec. 56); *Chancellor v. Wiggins*, 4 B. Monroe (Ky.) 201 (39 Am. Dec. 449); *Barton v. Faherty*, 3 G. Greene (Ia.) 327 (54 Am. Dec. 503); *Huntingdon v. Hall*, 36 Me. 501 (58 Am. Dec. 765); note in 62 Am. Dec. 460–468 to *Scott v. Hix*, 2 Sneed (Tenn.) 192. But it is also said that if one sells goods *not in his possession* at the time of the sale, there is no implied warranty of title, and the buyer takes his chances. See *Scott v. Hix, supra; Scranton v. Clark*, 39 N. Y. 220 (100 Am. Dec. 430.) But it is sufficient to raise an implied warranty of title that the seller has *constructive* possession of the goods, as where they are in the hands of an agent or tenant in common, holding the goods for the seller and as his property, and not adversely. (*Shattuck v. Green*, 104 Mass. 42.) And it would seem that the rule that a seller not in possession does not impliedly warrant title has reference to a case where *adverse possession*, with claim of right by a third person, apprises the buyer of the fact that he is *buying a law suit*, when it is supposed that the price of the goods is fixed with reference to the actual situation of affairs; and to presume that the seller warrants the buyer success in his suit to recover them would be unreasonable and unjust.

For the measure of damages (usually the price paid) where the buyer sues the seller on warranty of title, see *Hoffman v. Chamberlain*, 40 N. J. Eq. 663 (53 Am.

Rep. 783 and note). And for the importance of the buyer's notifying the seller that the chattel is claimed by a third person, and requiring him to defend the action, see *Burt v. Dewey* 40 N. Y. 283 (100 Am. Dec. 482), citing *Sweetman v. Prince*, 26 N. Y. 224.

WHAT IS SUCH A PROMISE "TO ANSWER FOR THE DEBT OF ANOTHER" AS IS REQUIRED TO BE IN WRITING SIGNED BY SEC. 4 OF THE STATUTE OF FRAUDS.—(See Code Va., sec. 2840.) Several requisites must concur:

(1) The promise must be made to the *creditor*. A promise to the debtor to pay his debt for him is not within the statute; and, if on sufficient consideration, is binding though made verbally. *Eastwood v. Kenyon*, 11 Ad. & E. 438. And the reason why a promise to save another harmless from the consequences of his acts (Indemnity, Anson on Contracts, p. 59), does not require to be in writing is that such promise is made to him who is to *become liable* (the *quasi* debtor), and not to him to whom the liability would be incurred (the *quasi* creditor). In the latter case writing is required.

(2) The promise must be to pay a debt as *guarantor*, for which debt another person is *primarily* liable. If A goes into B's shop, and says, "Let C. have goods, and if he does not pay you, I will," this is a collateral promise or guaranty, and unless in writing and signed by A is unenforceable; but it is otherwise when A says to B, "Let C have goods on my account," or "Let C have goods and charge me with them." Thus in *Hendricks v. Robinson*, 56 Miss. 694 (s. c. 31 Am. Rep. 382), the promise of Dulaney to pay Robinson for the goods supplied by him to Hendricks did not require to be in writing, as Hendricks was never *liable at all*, the credit being given entirely and solely to Dulaney, though the goods were delivered by his order to Hendricks. And the subsequent promise by Hendricks to Robinson to pay for the goods *did* require to be in writing; for it was to answer for the *debt of another* (that of Dulaney); and besides it was void for lack of consideration, the only consideration being *moral*, if indeed there was even a moral obligation on Hendricks to pay under the circumstances.

(3) The principal liability, while it may be prospective, must be real, *i. e.*, it must be incurred at *some time*. Thus in *Mountstephen v. Lakeman*, L. R. 7 H. L. 17, a contractor (the plaintiff) offered to make a side-drain into the main sewer if the defendant or the town would be responsible. The defendant said: "Go on and do the work, and I will see you paid." The town had never authorized the construction of the side-drain, and it refused to assume the liability. It was held that the defendant was liable, without writing, as principal debtor, the words, "I will see you paid," imposing a primary liability on himself. But it was said that even if the defendant's promise had been collateral, *e. g.*, "*If the town won't pay you*, I will," still no writing would have been required. The town was never responsible, but only himself. So that his promise could not be to answer for the *debt of another* within the meaning of the Statute of Frauds.

(4) The liability of the original debtor *must continue*. Thus in *Goodman v. Chase*, 1 B. & Ald. 297, the defendant promised the creditor to pay the debt if the creditor would release the debtor from prison, where he was confined for the debt under a writ of *Ca. Sa.* (now abolished). The law was that such release of a debtor operated *ipso facto* to discharge the debtor from his debt. Thus the discharge of the debtor extinguished his debt, and left the defendant alone liable,